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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

ANTHONY TAMILIO,

Petitioner,

vs.

WALTER FOGG, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY, AND ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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QUESTION PRESENTED

1. Whether the joint trial of petitioner and his two co-defendants for felony-murders was constitutionally impermissible under the Sixth Amendment inasmuch as the co-defendants had pleaded the affirmative defense to felony-murder under New York Law thus attributing the actual murders to petitioner and where the source for the purported "interlocking" confession ascribed to petitioner was the devoted friend and cellmate of petitioner's co-defendant Santanella and where said statement was denied by petitioner and the overwhelming weight of the credible evidence adduced at trial demonstrates that such statement could not have been made at the time and place sworn to by said witness?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Anthony Tamilio petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on July 27, 1983.

PROCEEDINGS BELOW

Following a jury trial in the Supreme Court, Kings County of the State of New York (Rinaldi, J.) petitioner and two co-defendants were convicted of two counts of felony murder (New York, Penal Law, Section 125-25(3)).

All three were sentenced to serve concurrent terms of imprisonment of from 25 years to life.

On appeal to the Appellate Division of the New York Supreme Court for the Second Judicial Department the convictions of petitioner's co-defendants were reversed. Petitioner's conviction was affirmed. *People v. Santanella*, 63 A.D.2d 744, 405 N.Y.S. 2d 284 (1978). The opinion is reproduced in the appendix at 41a-47a. Leave to appeal to the New York Court of Appeals was denied. *People v. Tamilio*, 45 N.Y. 2d 784 (1978). A petition for a writ of certiorari was denied by this Court (*Tamilio v. New York*, 443 U.S. 912 (1979)) with Justices Brennan and Marshall noting that they would grant certiorari.

On August 26, 1982, after more than a three (3) year analysis of the trial record and arguments of the respective parties the United Sttes District Court for the Eastern District of New York (Neaher, J.) granted petitioner's petition for a writ of habeas corpus, subject to the State's right to retry the case within sixty days. *Tamilio v. Fogg*, 546 F.Supp. 364 (1982). The District Court's opinion is reproduced in the appendix at 8a-34a. The opinion of the United States Court of Appeals for the Second Circuit reversing the District Court, is not, as yet reported. The Court of Appeals opinion is reproduced in the appendix at 1a-8a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 27, 1983. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1257(3).

INTRODUCTION

Petitioner, Anthony Tamilio respectfully presents this Honorable Court with the issue of profound significance in the highly-charged Sixth Amendment area of confessions and joint trials in criminal cases. *Parker v. Randolph*, 442 U.S. 62 (1979). Petitioner seeks the wisdom of this Court in the definition and application of standards for testing the fairness of criminal joint trials for murder where there are cross-implicating statements and where statutorily antithetical defenses are permitted by the State.

N.Y. Penal Law 125.25(3) (affirmative defense to felony murder); *Bruton v. United States*, 391 U.S. 123 (1968); *Parker v. Randolph, supra.*

The Sixth Amendment right of an accused to confront the evidence free of constitutional and statutory roadblocks is at the heart of the American system of justice.

The Court of Appeals below in reversing the District Court and reinstating petitioner's conviction, wrongfully placed on petitioner the burden of proving his claim of Sixth Amendment violation beyond the standards set by this Court. Fundamental fairness and due process require the guidance and supervision of this Court for the benefit of all citizens.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

"In all criminal prosecutions the accused shall en-

joy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Section I of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

N.Y. Penal Law Section 125-25(3)

Affirmative defense to felony murder utilized by the co-defendants in this joint trial for murder after petitioner's application for a severance was denied by the Trial Court provides:

"Except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

'(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

'(b) was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

'(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

'(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury."

STATEMENT

The petitioner, Anthony Tamilio, and his two co-defendants, John Cappiello and Ralph Santanella, were tried for the felony murder of Joseph and Angelina Tucci, in their home during the commission of a burglary and a robbery. Tamilio's motion for severance and a separate trial from the two co-defendants was denied and they were tried together and convicted. The co-defendants did not testify at the trial. However, Tamilio did testify, denying his guilt and offering evidence to establish that, although he was present at the murder scene with his two co-defendants, he had a legitimate reason to be there as a result of a business relationship with the deceased, and that they were alive after he left them. The prosecution contention was that the three defendants, acting together, killed the deceased during a robbery attempt. The deceased were bound and gagged and struck repeatedly with a hammer.

Hearsay evidence concerning statements by Tamilio's two co-defendants to third persons was ad-

mitted during the trial with limiting instructions to the jury that such statements be considered against only the defendant who made them. However, the trial court denied Tamilio's motion to redact such statements so as to exclude any references to him. These hearsay statements of the co-defendants placed primary responsibility for the crime on Tamilio.

Moreover, the prosecution introduced a statement made by Tamilio to a police detective in which he admitted that he went to the home of the deceased in the company of his two co-defendants on the morning of August 10, 1976, the date of the killings (Tr. 1388-9).* In addition, the prosecution introduced a highly inculpatory statement allegedly made by the petitioner to a prisoner, John Washington. Washington testified that he met the petitioner in a Criminal Court holding pen on August 18, 1976 and that they had a conversation that lasted five to seven minutes which was interrupted when other prisoners entered the pen. Petitioner allegedly told Washington that he was in for homicide but he was not scared because he was not caught at the scene of the crime. That he with his friends robbed an elderly couple he knew, ransacked the place and got a ring and a "few grand." The woman started to scream and petitioner hit her with a gun butt across the forehead. Petitioner also said he was going to give his co-defendant Cappiello five grand to put "it" on his co-defendant Santanella. He also testified that Tamilio showed him a clipping he had taken from his boot concerning the murder, trying to prove that he was on the clipping. Washington did not read the clipping (Tr. 1321-31).

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* Numbers in parentheses refer to the trial record.

According to Washington he later became a cell mate and a good friend of Santanella's and spoke to him about the same crime that he allegedly talked to the petitioner about (Tr. 1331-3). At the trial he testified to statements made by Santanella to him placing primary responsibility for the crime on petitioner (Tr. 1331-7).

Washington did not speak to the police about either conversation until October 31, 1976, some two months laters (Tr. 1339). He admitted to an extensive criminal background (Tr. 1343-6) and that he was a drug user (Tr. 1614). He decided to talk about this matter to obtain consideration on outstanding arrests (Tr. 1130).

He was aggressively cross-examined and numerous inconsistencies and improbabilities were developed, rendering his testimony highly suspect.

The prosecution also showed that the petitioner on the afternoon of August 10, 1976, with his co-defendant Cappiello, went to a branch of the Dime Savings Bank and presented the deceased's passbook, a withdrawal slip and a note, unsuccessfully attempting to make a withdrawal from the deceased's account.

The petitioner, Tamilio, unlike his co-defendants, testified in his own behalf and called several witnesses in his defense.

Tamilio testified that he, Santanella and Cappiello had gone to the Tucci home on the morning of August 10, 1976. However, he stated that he was doing an errand for his father and denied that the crime was com-

mitted at that time. It was his contention that the Tuccis were alive at the time he left their home. He called as witnesses neighbors of the Tucci's who recalled seeing the Tuccis alive later that afternoon and so informed the police.

Tamilio's father testified to sending his son to the Tucci home on August 10th on an errand.

Tamilio did not recall seeing or speaking with John Washington, denied making the statements Washington attributed to him and denied being alone with anyone in a Criminal Court holding pen on August 18, 1976 and denied having a newspaper clipping of the Tuccis' murders, and further denied any involvement in the crime (Tr. 1967-8).

He testified about the incident at the Dime Savings Bank, explaining that he met Cappiello at the Shopping Plaza where the bank is located by accident. Cappiello asked him to take out some money from his grandfather's or uncle's account saying that he knew people in the bank and that it would not look good if he went there. Tamilio attempted to make the withdrawal as a favor to Cappiello. He did not notice the name in the passbook and did not read it when it was given to him. At the time, he knew the deceased Joseph Tucci only by the name "Joe" and was unfamiliar with his last name.

The defendant called Harold Naber, a Captain in the New York City Department of Corrections who is responsible for the movement and control of prisoners assigned to the Department of Correction. He produced records of August 18, 1976 indicating that Tamilio and Washington were held in different detention cells

in separate parts of the court on that date. That Tamilio was detained with Santanella and others in a cell separate from Washington's and although it was possible that Tamilio could have been together with Washington before leaving the courthouse, they would not have been alone as stated by Washington (Tr. 1822-43).

Detective Kilcullen, a police detective, testified that there was a thorough search of Tamilio upon his arrest and no newspaper clipping was found upon him (Tr. 1456-9).

At the conclusion of the trial the jury convicted all defendants of two counts of felony murder.

The Court sentenced petitioner to concurrent terms of twenty-five years to life on the two murder counts.

On appeal, the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, reversed the convictions of petitioner's two co-defendants, but, affirmed petitioner's conviction, holding that portion of the courts charge which gave the jury the option of not considering the affirmative defense to felony murder, available to a non-killer defendant under New York law, notwithstanding that all the elements of the defense had been made out, was reversible error except as to the petitioner whose defense that he was not present at the time the crimes were committed precluded establishment of the elements of the affirmative defense as to him.

The Appellate Division further held that petitioner's alleged confession to Washington made the

Bruton rule inapplicable. Thus, a separate trial from petitioner's co-defendants was not warranted despite their respective pleading of the affirmative defense to felony murder. Appendix *infra* 41a-47a. Leave to appeal to the New York Court of Appeals was denied. *People v. Tamilio,* 45 N.Y.2d 784 (1978). Certiorari was denied by this Court (*Tamilio v. New York,* 443 U.S. 912 (1979)) with Justices Brennan and Marshall noting that they would grant certiorari.

Following a three year analysis of petitioner's claim the District Court found a violation of the *Bruton* rule and that the error under the peculiar facts of Tamilio's case was not harmless beyond a reasonable doubt. *Tamilio v. Fogg, supra.*

The United States Court of Appeals for the Second Circuit on the basis of their holding in *U.S. ex rel. Catanzaro v. Mancusi,* 404 F.2d 296, 300 (2d Cir. 1968), cert. denied 397 U.S. 942 (1970) found that petitioner's alleged statement to Washington interlocked sufficiently with the confessions of the co-defendants Cappiello and Santanella and therefore any *Bruton* error would be deemed harmless beyond a reasonable doubt.

REASONS FOR GRANTING THE WRIT

Broadly, this case presents for decision the validity of the so called Catanzaro-McNeil exception to the rule of *Bruton v. United States,* 391 U.S. 123 (1968). More narrowly, accepting arguendo, the validity of the exception, the question to be determined is whether that exception can constitutionally be invoked on the basis of an alleged confession to a fellow prisoner whose credibility is suspect, which the petitioner denies having made.

In *Bruton v. United States*, 391 U.S. 123 (1968), this Court held that the admission of a co-defendant's out of court confession which implicated the defendant at a joint trial violated the defendant's Sixth Amendment right to confront the witnesses against him and entitled him to a new and separate trial, even though the jury was clearly instructed to disregard the confession as to the defendant. The Court reasoned:

> Here the introduction of (the co-defendant's) confession posed a substantial threat to petitioner's right to confront the witness against him, and this is a hazard we cannot ignore. Despite the concededly clear instructions to the jury to disregard (the co-defendant's) inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all. *Id.* at 137.

However, the New York Court of Appeals has carved out an exception to *Bruton* in *People v. McNeil*, 24 N.Y.2d 550, 301 N.Y.S.2d 503, 249 N.E.2d 383, cert. denied, 396 U.S. 937 (1969). In that case each of the defendants had voluntarily made a detailed confession to law enforcement officials implicating himself as well as each of the other defendants in the crime charged. The jury had been given clear, forceful limiting instructions that each confession should be considered only against the declarant. Relying heavily upon *U.S. ex rel. Catanzaro v. Mancusi*, 404 F.2d 296 (2d Cir. 1968), the court held that "the logic of *Bruton* is inapplicable" where:

> each of the defendants has himself made a full and

> voluntary confession which is *almost identical* to the confessions of his co-defendants.

301 N.Y.S.2d at 504, (emphasis added). Therefore, according to *McNeil*, if Tamilio made a detailed, full and voluntary confession almost identical to those of his co-defendants, he is not entitled to a separate trial under *Bruton*.

McNeil has been consistently followed by the New York courts and was relied upon in this case by the Appellate Division which ruled that:

> "the Bruton rule is inapplicable where each of the defendants has made a confession almost identical to the confessions of his co-defendants. The critical consideration is whether the confession of the defendant relying upon Bruton 'interlocks with and supports' the confessions of the other defendants. If it does a separate trial is not required." 405 N.Y.S.2d at 288.

The doctrinal underpinnings of this holding has never been approved by this court which has instead applied the harmless error rule to Bruton violations. See, *Harrington v. California*, 395 U.S. 250 (1969); *Schnelle v. Florida*, 405 U.S. 427 (1972); *Brown v. United States*, 411 U.S. 223 (1973).*

The difference in the two approaches has been noted by courts and commentators.

In *Metropolis v. Turner*, 437 F.2d 207 (10th Cir. 1971), the court noted:

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* The Court below's finding that the interlocking confession exception to the *Bruton* rule has been recognized by this Court in *Parker v. Randolph*, 442 U.S. 62 (1979) is clearly erroneous. *Appendix at 5a.*

"It is the position of counsel that because of these significant factual differences, the instant case is either 'outside' the rule of *Bruton*, citing United States ex rel. Catanzaro v. Mancusi . . . , or, alternatively, if it be still technically "within" the *Bruton* rule, the violation is constitutionally harmless beyond a reasonable doubt, citing Harrington v. California. . . . We need not concern ourselves with the legal nicety as to whether the instant case is 'without' the *Bruton* rule, or is 'within' *Bruton* with the violation thereof constituting only harmless error. In either event the judgment of the trial court (granting habeas corpus) must be reversed."

In this case, the court explained:

The confessions of Metropolis and Johnson were paralleling confessions in which the confessing defendant not only spelled out in precise detail what he himself did in connection with the homicide, but also described the role played by his co-defendant. And the statements thus given by Metropolis and Johnson dovetailed in all important particulars. Id. at 208.

Despite its refusal to decide whether this case was inside or outside *Bruton*, the court followed the harmless error approach, stating:

The rationale of Harrington leads us to conclude that the trial court erred in granting the writ and discharging the petitioners. 437 F.2d at 209.

The court noted only that the *United States ex rel. Catanzaro v. Mancusi, supra*, was a "case analogous to the instant one." Id.

In fact, the Second Circuit itself, has voiced dissatisfaction with the *Catanzaro* approach in *United*

States ex rel. Ortiz v. Fritz, 476 F.2d 37 (2d Cir. 1973), *cert. denied*, 414 U.S. 1075 (1974). In that case the defendant argued:

> ... *Bruton* applies here because *Catanzaro* and progeny are really applications of Harrington v. California ... *Harrington* held that admission of co-defendants' confessions after *Bruton* was harmless constitutional error because a statement by Harrington placed him at the scene of the crime, and other incriminating evidence was so "overwhelming ... that this violation of *Bruton* was harmless beyond a reasonable doubt...." 395 U.S. at 254, 89 S.Ct. at 1728. Appellant argues here that because there was no such other evidence—though on this score the Bazooka bubble gum wrappers do constitute independent evidence, albeit based on Ortiz's own confession—the *Bruton* violation was certainly not "harmless beyond a reasonable doubt." 476 F.2d at 39.

The court reluctantly applied the rule of *Catanzaro*, noting that:

> ... we are somewhat uncomfortable with the implications of Catanzaro. Yet is it now the law of this circuit.... If it is to be overruled, it will have to be by the Supreme Court, absent the requisite en banc vote which—through prior circulation of this opinion—has not ensued. 476 F.2d at 40.

Thus, the court which decided the case upon which *McNeil* rests appears amenable to a shift to the harmless error approach. That the difference in approaches is more than a "legal nicety" is shown by the fact that the result in *Ortiz* would have been different under the harmless error approach:

> This appeal from the denial of a habeas corpus petition raises a serious question as to the applicability of Bruton v. United States . . . , in the case of "interlocking" confessions of co-defendants. Only because we consider ourselves bound by United States ex rel. Catanzaro v. Mancusi . . . , and its progeny in this circuit, do we affirm.

That the harmless error approach is the proper approach was argued in a law review article, "Nelson v. O'Neil: Severance as a Remedy for *Bruton* Errors," 46 *Temple Law Quart.* 111, 116 (1972):

> In essence, this approach (distinguishing *Bruton*) suggests that unless the inadmissible evidence is significant *Bruton* does not apply. What these courts are actually doing, however, is determining at the outset that there has been no reversible error and *then* declaring that the case does not involve a *Bruton* violation. The admission of any inculpatory statement of a nontestifying co-defendant, no matter how insignificant or repetitive, should be recognized as a *Bruton* violation.
>
> Going to a case's facts first in order to determine that the inadmissible evidence was harmless, is to skip an important step. Whether the inadmissible evidence is harmful or harmless should have nothing to do with error and should be made only *after* recognition that a constitutional right has been violated. This formality of procedure will make no difference in the outcome of many of the more blatant cases, where the prejudice was obviously minimal, as where the co-defendant's own confession was also in evidence. However, in the closer cases, it will be a reminder that there has been a violation of the appellant's constitutional rights; perhaps this fact, coupled with the reasonable possibility that the inadmissible evidence contributed

to his conviction, will result in more frequent reversals and a greater deterrent to prosecutors.

In this case, it appears that the outcome on appeal would have been different under the harmless error approach employed by this court in *Harrington v. California*, supra, and progeny, thus highlighting the errors of the *Catanzaro-McNeil* approach.

Here the defendant testified, denying his guilt, presenting an innocent explanation for the circumstantial evidence against him and adducing other witnesses and evidence in support of his defense. He denies making the highly incriminating confession to Washington, upon which the lower courts relied to invoke the Catanzaro-McNeil exception and adduced evidence in support of that denial through the Correction Department records and the testimony of Captain Naber and Detective Kilcullen which cast grave doubt upon Washington's claim that he had ever been alone with Tamilio in a holding pen at the Criminal Court as well as other aspects of his story.

Where, as occurred here, the confession relied upon to invoke the exception to the Bruton rule is itself seriously disputed, the risk that a jury may engage in bootstrapping is evident, despite cautionary instructions to the contrary. The danger is great that a jury will rely on the co-defendant's hearsay statements in arriving at a finding that the defendant made an incriminating statement which he seriously disputes. In this case, the prosecution was almost entirely based on petitioner's disputed statement to Washington, the jury having been given the usual cautionary instruction that his co-defendant's statements were inadmissible as to him, yet the con-

clusion is almost inescapable that these hearsay statements were improperly used to corroborate and bolster the disputed statement testified to by Washington.

Washington was Santanella's devoted friend and cellmate. Santanella pleaded the New York affirmative defense to felony murder. Who shows up at the trial to support Santanella's defense attributing the crime to petitioner, but Santanella's best friend and cellmate, Washington.

Under the circumstances it would have been most "unusual" had the statement attributed to petitioner by Washington did not "interlock" with metaphysical precision. After all Santanella and his friend Washington had months to concoct their little scenario. This is the same source upon which the Court below now invokes the application of the *Catanzaro-McNeil* rule. A source totally lacking in any indicia of reliability.

Furthermore, the Court below erroneously ascribed a misreading of the trial record to the District Court. Appendix 4A. Petitioner had indeed testified denying the making of the crucial statement to Washington *and anyone else when he testified:*

"Q. Did you see the witness Washington here?

A. I don't remember.

Q. Did you see him testify, showing him a newspaper clipping, you and he were all alone in a cell?

A. Yes.

Q. Were you ever alone in a cell with anybody at all, *all* the time you had been arrested?

A. No.

Q. Now, did you ever take a hammer and beat the Tuccis to death?

A. No.

Q. Did you tie them with ropes and gags and everything and ransack their apartment or anything?

A. No." (TR. 1967-68)

With all due respect to the learned court below the conclusion reached "He never denied making the statement' (Appendix 4a) simply will not square with the rule governing the "presumption of innocence." By virtue of his plea of not guilty the petitioner denied every material aspect of the State's case including the purported statement to Washington. Hence, the Court below's finding in this regard is totally incomprehensible. In rushing to reverse the District Court it would seem that it was the Court below that has misread the record and erroneously applied the law.

The only way to constitutionally redress this wrong, is through this Court's repudiation of the *Catanzaro-McNeil* approach, replacing it with the harmless error approach of *Harrington v. California*, supra.

Clearly, the issues raised here are important and federal courts throughout the nation are divided concerning these resolutions. See, Anno Confrontation Clause, Bruton Rule, 29 L. Ed. 2d, 931, Section 7, calling for the intervention of this court to properly resolve the issue. It is this dichotomy which undoubtedly prompted Justices Brennan and Marshall's dissent from the denial of certiorari when this case was here during the October 1978 Term of this Court more than five years ago.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"
DECISION DATED JULY 27, 1983

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Cal. No.: 775 August Term, 1982

(Argued January 25, 1983 Decided July 27, 1983)

Docket No. 82-2272

ANTHONY TAMILIO,

Petitioner-Appellee,

v.

WALTER FOGG, Superintendent, Eastern Correctional Facility, and ROBERT ABRAMS, Attorney General of New York,

Respondents-Appellants.

BEFORE VAN GRAAFEILAND, PIERCE and WINTER, *Circuit Judges*

Appeal from a judgment of the United States District Court for the Eastern District of New York, Neaher, J., which granted appellee's petition for a writ of habeas corpus on the ground that the introduction of evidence regarding out-of-court statements made by appellee's co-defendants violated appellee's constitutional right to confront witnesses. Reversed.

ALBERT J. BRACKLEY,
Brooklyn, N.Y.,
for Petitioner-Appellee

MICHAEL GORE, Ass't District Att'y, Brooklyn, N.Y.
(Elizabeth Holtzman, District Att'y Kings County, and Barbara D. Underwood, Ass't District Att'y, Brooklyn, N.Y., on the brief), *for Respondents-Appellants.*

VAN GRAAFEILAND, *Circuit Judge:*

In 1977, appellee Anthony Tamilio and two co-defendants were convicted in New York State Supreme Court of two counts of felony murder, N.Y. Penal Law §125.25(3) (McKinney 1975). Appellee's conviction was affirmed by the Appellate Division, 63 A.D.2d 744 (1978), and leave to appeal was denied by the New York Court of Appeals, 45 N.Y.2d 784 (1978). The United States Supreme Court denied certiorari. 443 U.S. 912 (1979). On August 26, 1982, the United States District Court for the Eastern District of New York, Neaher, J., granted appellee's petition for a writ of habeas corpus, subject to the State's right to retry the case within sixty days. 546 F. Supp. 364. We reverse.

Appellee, John Cappiello, and Ralph Santanella were charged by the State of New York with the felony murders of an elderly couple, Joseph and Angelina Tucci. According to the prosecution's theory, the murders occurred in the couple's home in Brooklyn on August 10, 1976, during the course of a burglary and robbery by the three co-defendants. The

deaths resulted from head injuries caused by blows from a blunt object. The victims' bodies, ties and gagged, were found in their home on August 12.

On the morning of August 10, Appellee and Santanella were seen emerging from an alley which ran alongside the Tucci home. Several hours later, appellee attempted unsuccessfully to withdraw $2,500 from the Dime Savings Bank with the use of Mr. Tucci's bank book. Appellee admitted that he was at the Tucci home with his co-defendants on August 10, but contends that he was there on an errand for his father and that Mr. and Mrs. Tucci were alive when he and his co-defendants left. He testified that, through pure happenstance, he met Cappiello later in front of the Dime Savings Bank and was asked by him to attempt the $2,500 withdrawal, posing as Tucci's nephew. Appellee's testimony as to the chance meeting was contradicted by that of Santanella's mother, who swore that she drove the three defendants from her home to the plaza where the Bank was located. Appellee also testified incredibly that, although he had known Mr. Tucci for six years and had been in his home at least fifty times, he did not know that his name was Tucci.

The State introduced evidence that each of the three defendants had admitted or confessed his participation in the crime and had implicated his co-defendants. Each time a witness testified concerning a statement by one of the defendants, the trial court instructed the jury that the statement was to be considered only against the defendant who had made it, and the court repeated these instructions in his charge. Appellee's statement allegedly was made to a fellow prisoner, John Washington, in the holding pen at criminal court.

Washington testified that he and appellee had been alone together in the pen for five to seven minutes, at which time appellee talked to Washington about the crime. Washington testified that appellee told him he and a couple of buddies were in for homicide, but that appellee was not worried because he had not been found at the scene of the crime. According to Washington, appellee said that he and his accomplices had gotten a ring and a few grand, and appellee showed him a newspaper clipping about the crime. Appellee purportedly told Washington that he knew the victims, how to get into their house, and where the money was. Appellee further stated, according to Washington, that he and Cappiello went in and ransacked the place. Appellee told him, Washington said, that when the lady screamed appellee started hitting her across the forehead with the butt of a gun while Cappiello held her. When the lady wouldn't be quiet, appellee "Just kept on hitting her."

The district court stated that appellee "denied ever seeing or speaking with John Washington," 546 F. Supp. 368, and "denied making the statements Washington attributed to him," *id.* at 367. This was a misreading of appellee's testimony. What appellee actually said was that he didn't remember whether he saw Washington in the bull pen and that he was never alone in a cell with anyone. He never denied making the statement. The district court then proceeded to compare the statements of the three defendants and wound up taking two mutually inconsistent positions. It held, first, that appellee's admissions to Washington interlocked with those of his co-defendants only to the extent that all statements identified appellee as a participant in the underlying felony of robbery upon which the murder charge was

based. *Id.* at 372-73. The district court then reversed its field, stating that appellee's co-defendants had named him the killer "in apparent confirmation of everything Washington told [the jury] petitioner had told him." *Id.* at 375. The district court's second position was correct; the statements of the three defendants interlock on all essential points, particularly on the point which the district court found to be critical, *i.e.*, that it was appellee who bludgeoned Mrs. Tucci. We disagree with the district court's assertion that appellee's admission that he "just kept on hitting" the eighty-two-year-old Mrs. Tucci on the head when she wouldn't keep quiet described a "less brutal" offense (*id.* at 373) than the statements of his co-defendants that appellee killed Mrs. Tucci by hitting her on the head.

The interlocking confession exception to the *Bruton* rule, *Bruton v. United States*, 391 U.S. 123 (1968), to which this Court long has been committed, *see United States ex rel. Catanzaro v. Mancusi*, 404 F.2d 296, 300 (2d Cir. 1968), *cert. denied*, 397 U.S. 942 (1970), has also been recognized by the Supreme Court, *Parker v. Randolph*, 442 U.S. 62 (1979). This doctrine does not require identity in statements. *United States ex rel. Ortiz v. Fritz*, 476 F.2d 37, 39 (2d Cir.), *cert. denied*, 414 U.S. 1075 (1973). It is sufficient if the confessions are "substantially the same and consistent on the major elements of the crime involved." *United States ex rel. Stanbridge v. Zelker*, 514 F.2d 45, 49 (2d Cir.), *cert. denied*, 423 U.S. 872 (1975). Essentially, to be interlocking, the statements must describe the same crime. *United States v. Fleming*, 594 F.2d 598, 604 (7th Cir.), *cert. denied*, 442 U.S. 931 (1979). The fact that a defendant takes the stand and denies his guilt, thus implicitly repudiating his in-

culpatory admissions, does not preclude application of the doctrine. *United States ex rel. Dukes v. Wallack*, 414 F.2d 246, 247 (2d Cir. 1969); *Felton v. Harris*, 482 F. Supp. 448, 454-56 (S.D.N.Y. 1979); *People v. Woodward*, 50 N.Y.2d 922 (1980).

Assuming for the argument only that the statements in the instant case did not interlock on the issue of who did the actual killing, resolution of that issue was not essential to the State's case. Appellee was convicted of felony murder, a killing by one of the three participants in the Tucci robbery. New York Penal Law § 125.25(3). Since appellee never sought the benefit of the "non-killer" affirmative defense provided for in the New York statute, it made no difference in his case which of the three defendants killed the Tuccis. Proof of appellee's participation in the robbery which culminated in the two killings established his guilt.

The interlocking confession doctrine is closely related to the doctrine of harmless error. We are convinced that, regardless of whether the statements of Santanella and Cappiello qualified as interlocking confessions, their admission constituted harmless error. Our conviction is "based on our own reading of the record and what seems to us to have been the probable impact of the [co-defendants'] confessions on the minds of an average jury." *Harrington v. California*, 395 U.S. 250, 254 (1969). It is undisputed that the deceased, Joseph Tucci, seventy-eight years old, four feet, eleven inches tall, and weighing one hundred fourteen pounds, would not open his door to anyone he didn't know. It is also undisputed that appellee was the only defendant whom Mr. Tucci knew. It is also undisputed that the three defendants were in the Tucci home on the morning of August 10, 1976. It is also

undisputed that several hours later appellee attempted to withdraw $2,500 from the Dime Savings Bank, using Mr. Tucci's bank book and posing as his nephew. It is also undisputed that appellee did not return to the Tucci home during the two days before the bodies were discovered to complete the unfinished "errand" which, he claims, took him there on the day of the killing.

These undisputed facts form the solid foundation upon which appellee's admissions to John Washington rest. The statements of appellee's co-defendants added such little to what already was in the case that, even if the jury failed to follow the trial court's limiting instructions which accompanied the admission of each statement, this would not have had a devastating affect on appellee's defense. *United States ex rel. Stanbridge v. Zelker, supra,* 514 F.2d at 48-49. In short, "we conclude that the 'minds of an average jury' would not have found the State's case significantly less persuasive had the testimony as to [the co-defendants'] admissions been excluded." *Schneble v. Florida,* 405 U.S. 427, 432 (1972). *See Brown v. United States,* 411 U.S. 223, 230-32 (1973); *United States ex rel. Nelson v. Follette,* 430 F.2d 1055, 1058-59 (2d Cir. 1979), *cert. denied,* 401 U.S. 917 (1971).

The judgment of the district court is reversed.

APPENDIX "B"
MEMORANDUM AND ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANTHONY TAMILIO,

Petitioner,

-against-

WALTER FOGG, Superintendent, Eastern Correctional Institution, ROBERT ABRAMS, Attorney General of the State of New York,

Respondents.

APPEARANCES:
ALBERT J. BRACKLEY, ESQ.
Brooklyn, New York
Attorney for Petitioner

DISTRICT ATTORNEY, KINGS COUNTY
Brooklyn, New York
Attorney for Respondents
By LAURIE S. HERSHEY, ESQ.
MICHAEL GORE, ESQ.
Assistant District Attorneys

NEAHER, District Judge.

Petitioner, a State prisoner serving concurrent terms of imprisonment of 25 years to life imposed

following his conviction on two counts of felony murder, has applied for a writ of habeas corpus pursuant to 28 U.S.C. §2254. His conviction was affirmed by the Appellate Division, Second Department, with an opinion, *People v. Santanella*, 405 N.Y.S.2d 284 (2d Dept. 1978), and leave to appeal to the Court of Appeals of the State of New York was denied. A petition for a writ of certiorari in the United States Supreme Court was also denied, 443 U.S. 912 (1979), with Justices Brennan and Marshall noting that they would grant certiorari. Petitioner has exhausted all available State court remedies.

The sole claim raised is that petitioner's conviction was obtained in violation of his Sixth Amendment right to be confronted with the witnesses against him as established in *Bruton v. United States*, 391 U.S. 123 (1968). Petitioner and two co-defendants, John Cappiello and Ralph Santanella, were tried jointly—petitioner's several motions for a severance having been denied—for the felony murder of an elderly couple, Joseph and Angelina Tucci, which occurred during a burglary and robbery in their home on August 10, 1976. Petitioner was 15 years old at the time of the crime. Although petitioner's co-defendants did not testify at trial, he did so, denying guilt and offering evidence in an attempt to establish that, while he was at the Tucci home with his co-defendants on the morning of August 10, 1976, he was there on an errand for his father and the Tuccis were alive when he left.

Petitioner asserts he was deprived of his right of confrontation by the admission into evidence of the unredacted confessions or statements of his co-defendants, which placed primary responsibility for

the murders on him. The trial court's rulings denying him a separate trial were based on the "interlocking confession" exception to the rule of *Bruton v. United States*, 391 U.S. 123 (1968), see *Parker v. Randolph*, 442 U.S. 62 (1979); *United States ex rel. Catanzaro v. Mancusi*, 404 F.2d 296 (2d Cir. 1968), *cert. denied*, 397 U.S. 942 (1970); *People v. McNeil*, 24 N.Y.2d 550, *cert. denied*, 396 U.S. 937 (1969), despite the fact that petitioner denied before the jury making the "confession" relied upon to invoke the doctrine and offered corroboration in support of his denial. He claims it was prejudicial error to deny him the right to cross-examine his co-defendants concerning their confessions or statements which implicated him as a participant in the crime.

Although the jury convicted all the defendants of felony murder, the Appellate Division granted new trials to petitioner's two co-defendants on the ground that the trial judge's improper instructions had denied them the benefit of the "non-killer" affirmative defense applicable in felony murder cases. The court said this error was not relevant to petitioner, however, because he "did not rely upon, and the evidence as against him did not suggest the availability of, the affirmative defense." 405 N.Y.S.2d at 288.

More significantly, petitioner was denied a new trial on the *Bruton* point urged here, even though the Appellate Division observed that Tamilio's "own statement does not clearly implicate himself as the actual murderer . . . [and] to that extent, . . . does not interlock with and support those of his codefendants," 405 N.Y.S.2d at 288, who repeatedly had asserted it was petitioner who did the killing. Reasoning that to convict petitioner on the charge of felony murder re-

quired the prosecution to show only that he participated in the underlying felony, not that he committed the murders, and that "to that extent" petitioner's statement had interlocked with and supported those of his co-defendants, the court held that:

> "so much of the statements of Santanella and Capiello as characterized Tamilio as the actual murderer was extraneous to the question of Tamilio's guilt or innocence of felony murder. Therefore, those portions of the codefendants' statements could not have been prejudicial to Tamilio, and it was unnecessary that such portions of those statements interlock with and be supported by a statement by him." 405 N.Y.S.2d at 288.

The evidence on which the defendants were convicted for the felony murders of the Tuccis is summarized below. Considering the record and arguments of counsel, the Court is of opinion that unless petitioner is granted a new trial within 60 days, the writ must be granted.

The prosecution's theory of the case was that the defendants acted together and killed the Tuccis during the course of a burglary and robbery. In its direct case, the prosecution introduced by petitioner's count no fewer than nine out-of-court statements made by his co-defendants to third persons placing primary responsibility for the murders on petitioner. Although the statements were admitted with limiting instructions to the jury that they could only be considered against the person who made them, the court denied petitioner's motion to redact the statements so as to exclude any references to him. The prosecution also introduced two statements allegedly made by petitioner, one of which served as the basis for application of the interlocking confession doctrine.

Following the introduction of evidence that the victims were found on August 12, 1976, and had died of multiple blunt force injuries to the head, Lorraine Frasca, a neighbor, testified that on August 10, 1976, at approximately 11:00 a.m., she observed a single car parked on the "wrong side" of the street near the Tuccis' house and saw two boys coming from an alleyway alongside the house. She identified petitioner and Santanella as the boys she observed and noted that a third boy remained in the back seat of a green station wagon parked nearby, license number 729 KUE, which she remembered because her son's birthday was July 29, She also testified to a prior lineup identification in which she picked petitioner from six individuals.

Several tellers at the Dime Savings Bank testified. Timothy O'Neill said he was presented a bankbook in the names of Joseph and Angelina Tucci on August 10, 1976. He saw petitioner at the bank and later identified him at a lineup. Maria Pimenta also testified she saw petitioner at the Dime Savings Bank on August 10. Finally, Virginia Dunphy stated petitioner presented a bankbook in the name of Tucci on August 10, 1976, and that she also picked petitioner out of a six man lineup. An expert in fingerprint identification testified that a photograph of a fingerprint found on the bankbook compared closely with the fingerprint chart of petitioner.

Russell Cunningham testified that he was a friend of Cappiello, that Cappiello told him that he, Santanella, and petitioner went to the Tucci house to search for money; that Cappiello had run out of the house "in shock" after he saw petitioner hitting the "old people" with a "hammer or something;" and that

petitioner told Cappiello to "finish off" one of the old people but Cappiello refused.

Frank Serpico then testified to a conversation he had with Santanella on August 12, 1976, during which Santanella said he had participated in a robbery in which two people were killed; that Santanella told him he went to the Tucci house with Cappiello and petitioner, using his mother's car, and that, once at the house, they tied up the two old people, searched the house and petitioner killed the old lady.

The next prosecution witness, Glen Reinhold, testified to a conversation he had with Cappiello on August 12th or 13th. He said Cappiello told him he came into the house after the people had been killed; that Santanella and petitioner went into the house first and killed the old woman and petitioner told Santanella to finish off the man.

Michael Nogaro testified he was in a car with Cappiello and Cunningham on August 10, 1976, when Cappiello recounted the story of the murders. He also testified that Cappiello went out of the house after petitioner struck the old lady with "a tool or a hammer."

John Washington, a fellow prisoner of petitioner's in a Criminal Court Building holding pen, testified to a statement made to him by petitioner—and the critical one for purposes of his claim—on August 18, 1976. Washington stated he was alone with petitioner in the holding pen for a few minutes when he asked petitioner what he was in for and petitioner replied that he and two "buddies" were in for homicide but that he was not caught at the scene of the crime and therefore

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he was not scared. He said the robbery netted "a ring and a few grand."[1] Washington further testified that petitioner also told him they ransacked the house and that when the old lady began to scream he hit her with a "gun butt;" and that petitioner said he was going to give Cappiello "five grand" to "put it on" Santanella.

Washington acknowledged that he was a friend and cellmate of Santanella and also testified to statements made by Santanella that placed primary responsibility for the crimes on petitioner. Washington's cooperation with the police concerning the Tucci murders did not begin until October 31, 1976, approximately two and a half months later. Petitioner later denied making the statements Washington attributed to him.

Finally, the prosecution called Detective Kilcullen, who testified as to the scene of the crime, the lineups and identifications made, and oral statements made by Cappiello and petitioner. He stated he visited petitioner's father's garden and nursery on August 14, 1976, and petitioner informed him that he had last seen Santanella on August 10, 1976, when he, Santanella and Cappiello had been driving in Santanella's mother's car. Kilcullen also testified to statements Cappiello gave him, after being advised of his rights, and subsequently gave to an Assistant District Attorney on the evening of August 14, 1976. The statements were detailed and a complete account of Cappiello's version of the murders and directly implicated petitioner in the crime. Cappiello admitted seeing petitioner strike the lady, stated they "did it" and took a bankbook and a ring. He also admitted that he and petitioner took the bankbook to

the Dime Savings Bank, Kings Plaza, but threw the book away when the teller refused to give them any money.

The defense case consisted of the testimony of a number of witnesses called to demonstrate that the Tuccis were alive at some time later in the day on August 10, 1976, although they failed to establish that the Tuccis were alive at any specific time on that date. A Department of Corrections captain produced records of August 18, 1976, which indicated that petitioner and Washington could have been together on that date, but that it was unlikely they could have been alone, as Washington testified. Petitioner's father next testified that he had bought cement pots from Joseph Tucci for his nursery and that his son had offered to pick them up in a friend's station wagon on the morning of August 10, 1976. He testified that he did not see his son between 10:00 a.m. and noon on that date but did so about 2:30 to 3:00 p.m., when petitioner told him the pots were not ready. Finally, petitioner testified in his own behalf.

Petitioner stated he went to the Tuccis on the 10th in Santanella's mother's station wagon to pick up cement pots for his father and that Cappiello stayed in the car when they went inside. The pots were allegedly too heavy for the car and they left. Petitioner further testified he went to Kings Plaza in the afternoon and happened to meet Cappiello there, who asked him to help take money out of the bank for him. Petitioner said he presented a note to a teller stating he was related to the person named on the bankbook but testified he did not know the name on the book. The teller refused to give him the money. Petitioner denied ever seeing or speaking with John Washington and denied any involvement in the crime.

On cross-examination, petitioner responded that he was quite surprised to meet Cappiello at Kings Plaza on August 10th and denied having been driven to Kings Plaza by Mrs. Santanella. This latter testimony was in flat contradiction to Mrs. Santanella's testimony on the prosecution's direct case, when she stated that petitioner came to her house at approximately 9:30 a.m. on the 10th and that she drove her son to a dentist's appointment at 11:15 a.m., and also drove petitioner and Cappiello from her house to Kings Plaza, where she left them. After her son's appointment, she left Santanella near Kings Plaza.

In seeking to overturn his State conviction petitioner relies on the federal constitutional arguments he previously raised on his State appeal. In addition, relying on the subsequently decided case of *Parker v. Randolph, supra*, petitioner raises the novel legal contention, to which the Court turns first, that the "interlocking confession" exception to *Bruton* which the State court invoked to justify admission of the statements made by non-testifying co-defendants is inapplicable in cases where, as here, the incriminated defendant challenges the making of his confession before the jury. In *Parker*, the State urged the Supreme Court to follow the reasoning of the Court of Appeals for the Second Circuit in *United States ex rel. Catanzaro v. Mancusi, supra*, 404 F.2d 296, 300, which held the *Bruton* rule inapplicable "[w]here the jury has heard the defendant's own [interlocking] confession." This rule is also followed by New York State courts. See, *e.g., People v. Safian*, 46 N.Y. 2d 181 (1978); *People v. McNeil supra*. In a plurality opinion, the Supreme Court agreed in *Parker* that admission of the interlocking confessions at the joint trial did not infringe respondents' right of confrontation but pur-

ported to "cast the issue in a slightly broader form than that posed by [the State]." 442 U.S. at 72.

Petitioner here concedes that the Court's plurality opinion, while not definitively settling the issue, leaves the interlocking confession doctrine of the Second Circuit and State of New York intact. He contends, however, that the *Parker* plurality limited its application to cases where the incriminated defendant has made an extra-judicial "admission of guilt" which "stands before the jury unchallenged." *Parker v. Randolph, supra*, 442 U.S. at 73 (Rehnquist, J.). Applying this limitation, petitioner argues that the trial court committed prejudicial error in denying his motions for a severance and redaction of any reference to him in the co-defendants' statements, since he denied before the jury making the confession to Washington, upon which the court relied in invoking the interlocking confession rule, and undermined Washington's testimony with evidence that, he claims, cast doubt on that portion of his testimony which placed him alone with petitioner in a criminal court pen on August 18, 1976.

Confronting petitioner's arguments on the merits, respondents contend that petitioner has misapprehended the language of the *Parker v. Randolph* opinion and the plurality's holding. Petitioner bases his contention on the following:

> "The right protected by *Bruton*—the 'constitutional right of cross-examination,' *id.*, at 137, 88 S.Ct., at 1628—has far less practical value to a defendant who has confessed to a crime than to one who has consistently maintained his innocence. Successfully impeaching a co-defendant's confession on cross-examination would likely yield small advantage to the

defendant whose own admission of guilt stands before the jury unchallenged." 442 U.S. at 73.

Respondents point out that these observations, which form part of the plurality's review of the *Bruton* rule and its foundation in the sixth amendment right of confrontation, precede the passage which actually states the plurality's holding:

> "When, as in *Bruton*, the confessing co-defendant has chosen not to take the stand and the implicated defendant has made no extrajudicial admission of guilt, limiting instructions cannot be accepted as adequate to safeguard the defendant's rights under the Confrontation Clause. Under such circumstances, the 'practical and human limitations of the jury system,' *Bruton v. United States, supra*, at 135, override the theoretically sound premise that a jury will follow the trial court's instructions. But when the defendant's own confession is properly before the jury, we believe that the constitutional scales tip the other way. The possible prejudice resulting from the failure of the jury to follow the trial court's instructions is not so 'devastating' or 'vital' to the confessing defendant to require departure from the general rule allowing admission of evidence with limiting instructions. We therefore hold that admission of interlocking confessions with proper limiting instructions conforms to the requirements of the Sixth and Fourteenth Amendments to the United States Constitution." 442 U.S. at 74-75.

The parties have closely debated what the reference to an admission of guilt standing before the jury "unchallenged" signifies. Respondent suggests it means only "legal" challenges, for example, on grounds of voluntariness or violations of rights under *Miranda v. Arizona*, 384 U.S. 136 (1966). Petitioner

disputes that interpretation, contending it renders illogical the earlier allusion to "one who has consistently maintained his innocence," since "legal" challenges are typically made without reference to the question of guilt or innocence. He urges the Court to construe the *Parker* plurality opinion as limiting the interlocking confession doctrine to defendants who have in fact confessed, thus excluding cases such as his where a "factual" challenge is launched to the actual making of the confession. He finds support for his interpretation in Justice Stevens' dissent, which charges the plurality with creating an exception to *Bruton* whenever "there is evidence that the defendant has also made inculpatory statements *which he does not repudiate at trial.*" 99 S. Ct. at 2144 & n.2 (emphasis supplied).

Although petitioner's arguments have appeal at first blush, they must be rejected. His position would permit any defendant whose statements or confessions had been placed before the jury to obtain a severance or reversal on appeal, in cases in which co-defendants' statements have been admitted on an "interlocking" confession theory, simply by disclaiming his own confession. Such a result, of course, is untenable.[2]

Moreover, the plurality opinion in *Parker* cannot be construed as creating the limitation on the "interlocking" confession doctrine petitioner urges. As the State points out, the actual holding of the case is that admission of interlocking confessions with proper limiting instructions conforms to the requirements of the sixth and fourteenth Amendments. Certainly the plurality could not have intended the broad limitation petitioner perceives in other

language in the opinion. As a practical matter, the limitation could easily swallow the exception to the *Bruton* rule that petitioner concedes remains the law in this circuit.

Although petitioner must fail in his effort to narrow the plurality holding in *Parker v. Randolph*, and with it this circuit's rule developed in *United States ex rel. Catanzaro v. Mancusi, supra*, he has raised a far more troubling and substantial issue by renewing a contention from his State appeal. He points out that his disputed statement to Washington and those made by his co-defendants were not enough alike for the State courts to hold that they truly "interlocked" and thus were outside the protective scope of *Bruton*, and within the general rule that jury instructions will suffice to avert any prejudice without need for severed trials or redacted statements. What is most troubling about the case is that throughout the trial, by reason of the admission of the unredacted statements of petitioner's co-defendants, the jury was repeatedly reminded of the baneful fact that two of the three defendants on trial before them for murder named the third, petitioner, as the killer without petitioner having the opportunity to test the truth of the assertions by cross-examination. Concededly, the statements partially "interlocked" as to petitioner's participation in the underlying felony. Nevertheless the Court cannot ignore the clear possibility that the substantial prejudice which must be recognized to have accrued to petitioner from the plain *Bruton* error committed with respect to his guilt or innocence as a "killer participant" under the trial judge's instructions, spilled over to the jury's consideration of the alternative ground of petitioner's "mere participation" in the underlying felony. Thus, although petitioner's "confession" to

Washington "interlocked" with his co-defendants' statements as to petitioner having played at least this lesser role, the improper singling out of petitioner as the killer presented the jury with such clearly damning information that the *Bruton* error must be held to have permeated the jury's consideration of petitioner's guilt or innocence as a "mere" participant in the felony as well, despite the trial judge's limiting instructions.

The interlocking confession cases in this circuit, where the doctrine developed, provide only a general guide to decision in this case. Indeed, they only confirm how far from ordinary the facts of this case have marked it and, consequently, why error under *Bruton* that was not harmless beyond a reasonable doubt must be held to have occurred.

Determining whether confessions or statements "interlock" is inherently a largely factual process, the object of which has been well explained in terms of the doctrine's rationale. Under *Bruton*,

> "error of constitutional dimensions does not inevitably occur if the questioned confession is admitted under proper instructions from the court concerning its limited use and purpose. The likelihood of error must be measured against the prejudicial consequences of the failure to follow the court's instructions, *i.e.*, the 'devastating' effect of the incriminations contained in the codefendants' admissions. [See *Bruton*, at 136]. Where the confession adds nothing to what is otherwise clearly and properly in the case, it can have little 'devastating' effect.
>
> "This situation would clearly obtain were the defendants to voluntarily sign identical confessions.

> However, since confessions are rarely maternal twins, the court must look to their substance to see whether they interlock sufficiently on vital points to indicate a common genesis. If they do, 'devastating' effects do not follow from their admission."

United States ex rel. Stanbridge v. Zelker, 514 F.2d 45, 48-49 (2d Cir.), *cert. denied*, 423 U.S. 872 (1975). *Accord, Parker v. Randolph, supra*, 442 U.S. at 72-75 (plurality).

Contentions that a defendant's confession or statement does not interlock with and support that of a nontestifying co-defendant have rarely succeeded. An exception is *United States v. Castello*, 426 F.2d 905, 907 (2d Cir. 1970), where the denial of a motion to vacate a conviction under *Bruton* was reversed because the defendant's "bare statement" testified to at trial by another was that he had planned a robbery of the bank that was robbed, while the co-defendants' "interlocking" confessions had "detailed efforts of the [defendant] after the crime was consummated."

More usual are cases like *United States ex rel. Duff v. Zelker*, 452 F.2d 1009 (2d Cir. 1971), and *United States ex rel. Ortiz v. Fritz*, 476 F.2d 37 (2d Cir. 1973). In *Duff*, the defendant's confession differed in that he stated he had walked from the car "the other way" from the liquor store he was charged with robbing, while his co-defendants had stated that he walked from the car to the store with the two who performed the robbery. In other statements, however, the defendant had acknowledged to detectives that he had agreed to participate in the robbery and act as lookout. Considering the defendant to have confessed "to essentially the same facts" as the co-defendants the court held that in light of the defendant's un-

disputed presence at the robbery, the co-defendant's statements placing him with the robbers themselves "were not a 'vitally important' part of the prosecution's case against him." 452 F.2d at 1010 (citation omitted).

In *Ortiz*, the court rejected a contention that confessions by the habeas petitioner and his co-defendants, his brother Alfredo and one Valencia, were not interlocking because that of Alfredo did not cover the slaying itself and Valencia's put the crime nine hours later than the other two. These differences did not detract from the significant, interlocking aspects of the confessions. "As to motive, plot and execution of the crime they are essentially the same." 476 F.2d at 39. Significantly, however, the court emphasized that there is no "content of the codefendants' confessions that implicates [defendant] in the commission of the crime more than does his own confession—in fact, of the three his own is the most significant." See also *United States ex rel. Smith v. Montanye*, 505 F.2d 1355, 1359-60 (2d Cir. 1974) (admission of statements by co-defendant describing defendant's meeting with two others, at which defendant acknowledged having stabbed the victim, held not in violation of *Bruton* where the two others testified as to the meeting and the defendant's statements; "the content of [the co-defendant's] statements is substantially identical to that of two other testifying witnesses and does not implicate petitioner any more in the commission of the crime than does their independent testimony which was subject to full cross-examination").

This theme was developed further in *United States ex rel. Stanbridge v. Zelker, supra*, 514 F.2d 45.

The Court of appeals there reversed the district court's grant of habeas corpus relief and overturning of a State manslaughter conviction on the ground that *Bruton* had been violated because there were "significant differences" between the confessions of the habeas petitioner and his co-defendant. These related to the petitioner's knowledge that his co-defendant, who did the killing, possessed or intended to use a dangerous weapon. Citing *Ortiz, supra*, the court said the asserted differences were "irrelevant to any of the elements of the crime of manslaughter of which petitioner was convicted. . . . There was nothing in [the co-defendant's] confession that implicated petitioner any more in the commission of the crime than did his own confession." 514 F.2d at 49-50. Significantly, the trial judge's instructions did not require the jury to find the defendant knew the co-defendant had a shotgun in order to convict but only that he participated in a conspiracy in the furtherance of which the shooting occurred. As to that, the defendant's statements "standing alone" were sufficient to sustain the conviction. 514 F.2d at 50.

The foregoing cases hold essentially that there is no error under *Bruton* where the content of the co-defendants' statements adds nothing significant to the statements made by the defendant. In none of them, however, was there presented the problem that makes this case troubl ome. The statements here interlock only in part, and the point on which they diverge, and where *Bruton* error is plain, is on the enormously potent issue of petitioner's role as the killer.

Confronted with petitioner's arguments on the point, the Appellate Division clearly recognized the existence of potential *Bruton* error by ruling that peti-

tioner's statement to Washington did not completely "interlock" with those made by his co-defendants because the statements conflicted as to petitioner's role as the killer. The statements of Cappiello and Santanella implied and asserted that Tamilio killed the Tuccis but "Tamilio's own statement [did] not clearly implicate himself as the actual murderer." 405 N.Y.S.2d at 288.

On federal habeas review of a State court conviction, factual determinations of the State courts are presumed correct, even when made by an appellate court. See *Sumner v. Mata*, 449 U.S. 539 (1981); 28 U.S.C. §2254(d). This Court cannot say that the record does not fairly support the Appellate Division's determination as to how far "confessions" of petitioner and his co-defendants interlock. Certainly the record does not provide convincing evidence that this factual determination is in error.[3]

Nevertheless, the Appellate Division held that reversal and a new trial were not required. It said that it was unnecessary that the portions of the co-defendants' statements incriminating petitioner as the killer completely "interlock with" and be supported by petitioner's confession, since in its view those portions "could not have been prejudicial to him." 405 N.Y.S.2d at 288. The court reasoned that the characterizations of petitioner as the killer contained in those statements were "extraneous to the question of [petitioner's] guilt or innocence" of felony murder. *Id.* Under the cases, the court implicitly accepted that the portions of the description petitioner allegedly gave Washington about striking Mrs. Tucci during the robbery to silence her, and the supposed "take," which interlocked with and supported other

portions of the statements of the co-defendants, were equally damaging to petitioner under the trial court's instructions as the co-defendants' description of him as the "killer participant," notwithstanding that petitioner denied having made the statement and plausibly explained his presence at the Tucci home and presentation of the passbook at the Dime Savings Bank.[4]

The content of the incriminating statements made by petitioner's co-defendants, however, stands in the way of such an easy solution. First, the identification of petitioner as the murderer was never wholly "extraneous" to petitioner's guilt or innocence of felony murder. Of course, it was not necessary for the prosecution to show petitioner was the murderer. Yet that was the conclusion the prosecution clearly invited the jury to draw about petitioner from Cappiello's statements.[5] In addition the trial judge's instructions focused the jury's attention as much on the theory that a defendant would be guilty of felony murder as the "killer participant" as on the theory that any defendant could be convicted of felony murder for merely participating in the underlying felony without having committed the actual murders.[6] The importance of determining whether any of the defendants was in fact a "killer participant" was further brought home by the trial judge's instructions as to the availability of the "non-killer" defense to felony murder.[7]

Clearly, to the extent the jury understood that petitioner could be found guilty if it determined beyond a reasonable doubt that he was a "killer participant," the *Bruton* rule was violated. The statements of the nontestifying co-defendants implicated petitioner on a salient point of the crime

charged in the instructions more than his own disputed statement did. If *Bruton* was violated by the jury's consideration of whether petitioner was the "killer participant" depicted by his co-defendants, because the statements did not interlock on this point, there arises the "substantial risk," which *Bruton* recognized, that the jury did not follow the court's limiting instructions but weighed the "devastating" implications of the untested incriminating statements in deciding that petitioner was a "killer participant." It strains any common-sense view of the "probable impact," *Harrington v. California*, 395 U.S. 250, 254 (1969), on the minds of a jury in a murder trial, of an identification of a defendant as the murderer by his co-defendants, to hypothesize that the jury could ignore the picture of petitioner as the killer put immediately before them by the co-defendants' statements, and instead rest their conviction upon the less brutal (though legally equally culpable) facts that he participated in the robbery and hit Mrs. Tucci.

The problem is clearly one of prejudicial spill-over of a *Bruton* violation. The prejudicial consequence of the jury's failure to follow the court's instructions is that they would consider petitioner was the "killer participant" depicted by his co-defendants. With that picture fixed in their minds they could not fairly have considered petitioner's guilt based on his mere participation in the underlying felony.

The observations of Justice Blackmun, concurring in the result in *Parker v. Randolph*, *supra*, bear directly on the kind of "spill-over" prejudice that occurred in this case. It was Justice Blackmun's view, joined in by the three dissenting justices, see 442 U.S. at 81, not to

"depart from the harmless error approach in interlocking confession cases. The fact that confessions may interlock to some degree does not ensure, as a *per se* matter, that their admission will not prejudice a defendant so substantially that a limiting instruction will not be curative. The two confessions may interlock in part only. Or they may cover only a portion of the events in issue at the trial. Although two interlocking confessions may not be internally inconsistent, one may go far beyond the other in implicating the confessor's codefendant. In such circumstances, the admission of the confession of the codefendant who does not take the stand could very well serve to prejudice the defendant who is incriminated by the confession, notwithstanding that the defendant's own confession is, to an extent, interlocking. I fully recognize that in most interlocking confession cases, any error in admitting the confession of a nontestifying codefendant will be harmless beyond a reasonable doubt. Even so, I would not adopt a rigid *per se* rule that forecloses a court from weighing all the circumstances in order to determine whether the defendant in fact was unfiarly prejudiced by the admission of even an interlocking confession. Where he was unfairly prejudiced, the mere fact that prejudice was caused by an interlocking confession ought not to override the important interests that the Confrontation Clause protects." 442 U.S. at 79.

Recently, this circuit seems also to have acknowledged the possibility that application of the interlocking confession doctrine may itself be cause for prejudice. In holding that the prosecution "neither sought to argue [one defendant's] guilt from [the codefendant's] confession nor created any substantial risk that the limiting instruction would be ignored," *Kirksey v. Jones*, 673 F.2d 58, 61 (2d Cir. 1982), the court carefully noted that application of the interlock-

ing confession rule "would have created a greater risk of prejudice" if "independent evidence" had not linked the petitioner to the scene of one of the crimes and if the co-defendant's confession "had incriminated [petitioner] as to a salient point not set forth in [his] own confession." 673 F.2d at 60 n.2.

Unlike *Kirksey v. Jones*, where apparently no good explanations for the independent evidence of the defendant's role in the crimes was offered, the independent evidence in this case identifying petitioner in the Tucci driveway and with the Tucci bankbook was met by petitioner's admission that he had been at the Tucci home to pick up cement pots for his father, and had tried to do his friend Cappiello a favor. On the other hand, petitioner was never directly identified as the murderer, even by his own confession. Therefore the incriminating nature of his co-defendants' statements that this was so could only have prejudiced him in the jury's consideration of his guilt or innocence as a participant in the underlying felony. In effect, his role had already been settled.

Since there was error under *Bruton* in admitting the confessions of petitioner's co-defendants at their joint trial, the question next arises whether this constitutional error was harmless beyond a reasonable doubt. See *Hendrix v. Smith*, 639 F.2d 113 (2d Cir. 1981). In that case the Court of Appeals drew from *Schneble v. Florida*, 405 U.S. 427 (1972), and *Chapman v. California*, 368 U.S. 18 (1967), the following definitions of harmless error in a *Bruton* situation:

> " 'There is little, if any, difference between our statement in *Fahy v. Connecticut* [375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171] about "whether there is a reasonable possibility that the evidence complained of

might have contributed to the conviction" and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.' ([*Chapman v. California*] 368 U.S. at 24 . . . .)

* * *

" 'Thus, unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required. See *Chapman v. California*, 386 U.S. 18, 24 [87 S.Ct. 824, 828, 17 L.Ed.2d 705] (1967). In this case, we conclude that the "minds of an average jury" would not have found the State's case significantly less persuasive had the testimony as to Snell's admissions been excluded. The admission into evidence of these statements, therefore, was at most harmless error.' [*Schneble v. Florida*] 405 U.S. at 432." 639 F.2d at 115.

The significant vice of the admission of the co-defendants' statements in this case is that their content unfairly refuted petitioner's defense by offering apparently conclusive, yet unexamined corroboration of what Washington testified petitioner had confessed (however improper it was to consider it).[8] By itself, Washington's testimony providing the confession was open to suspicion. A corrections official provided reliable testimony that the conversation could not have occurred in the private manner Washington said. Further, his sharing of a cell with petitioner's co-defendant Santanella and professed friendship for "Ralphie" provided obvious motivations for his testimony. Indeed, Santanella himself could have

been the source of Washington's information which the latter supposedly waited almost three months to bring to the prosecution's attention. On the other hand, petitioner denied on the stand that he ever "confessed" to Washington, and offered plausible explanations for the other independent evidence closely linking him to the crime, Mrs. Frasca's identification of him in the Tucci driveway and the bank teller's identification of him with the bankbook. Without petitioner's purported confession, these witnesses provided the prosecution with a probably sufficient but hardly overwhelming circumstantial case against petitioner.

Clearly it was important to the prosecution that the jury accept petitioner's "confession" to Washington as proof of what happened. Essentially, however, the jury had been improperly informed that petitioner's co-defendants had named him the killer, in apparent confirmation of everything Washington told them petitioner had told him. In those circumstances they could not fairly consider petitioner's denial that he ever "confessed" to having participated in the crimes. Since it cannot be said now how the jury might have viewed petitioner's "confession" to Washington, *i.e.*, whether or not they would believe he made it, and since that confession obviously was critical to the prosecution, it cannot be said that the *Bruton* error in this case was harmless beyond a reasonable doubt.

Accordingly, the petition for a writ of habeas corpus will be granted unless petitioner is granted a new trial within sixty (60) days of the date of this Order.

SO ORDERED.

The Clerk of Court is directed to forward copies of this Memorandum and Order to counsel for the parties.

s/Edward R. Neaher
U.S.D.J.

Dated: Brooklyn, New York
August 26, 1982

FOOTNOTES

1. The witnesses Cunningham, Serpico and Nogaro also testified that they were told a ring was taken from the house.

2. *Cf. Felton v. Harris*, 482 F. Supp. 448, 456 (S.D.N.Y. 1979), decided after *Parker v. Randolph*, in which Judge Weinfeld held there was no *Bruton* violation in admitting the confession of a nontestifying co-defendant under the interlocking confession doctrine where the defendant unsuccessfully testified to vitiate the force of his own incriminating statements by denying their truth.

3. Although the present argument was not as fully developed in petitioner's State appeal brief, the Appellate Division's treatment of the "interlocking" aspect of the case amply satisfies any doubts regarding exhaustion of remedies. *Cf. Mitchell v. Smith*, 633 F.2d 1009, 1011 (2d Cir. 1980), *cert. denied*, 449 U.S. 1088 (1981) (comity does not require that federal

court give greater deference to State procedural rules than State courts do themselves).

4. The court stated that "[s]ince the indictment charged Tamilio with felony murder, his conviction on those counts flowed automatically from the prosecution's showing that he participated in the underlying felony, during the course of which one of the defendants caused the deaths of the Tuccis." *People v. Santanella*, 63 A.D.2d 744, 405 N.Y.S.2d 284, 288 (2d Dept. 1978). It is unclear from this statement whether the court held there was no *Bruton* error at all, as the reasoning of *MacNeil, supra*, in following the Second Circuit *Catanzaro* decision, would indicate, or whether any *Bruton* error was harmless beyond a reasonable doubt.

To the extent that the court first looked to other evidence besides petitioner's confession to gauge the effect of the claimed wrongful admission of the co-defendants' confessions, it would have adopted a harmless error approach seemingly inconsistent with the *Parker v. Randolph* plurality and case law in this circuit and New York State. The point, however, is not critical.

5. See Tr. at 2271-75.

6. See Tr. at 2307-98, 2311-12.

7. See Tr. at 2323-26.

8. On summation, the prosecutor sought to bolster Washington's version of Tamilio's "confession" by openly inviting the jury to view the co-defendants' statements as corroboration:

"And, you see, if all you had in this case was John Washington, you might say to yourselves, what's going on here, but John Washington is corroborated constantly throughout this case. He is corroborated by Lorraine Frasca. He is corroborated by the bank people. *He is corroborated by the defendant Cappiello's confession. He is corroborated by what Ralph tells him. See, he's corroborated all along the line.*" Tr. at 2284 (Emphasis added).

APPENDIX "C"
DECISION DATED APRIL 24, 1978

THE PEOPLE, etc.,

Respondent,

v.

RALPH SANTANELLA, JOHN CAPPIELLO and ANTHONY TAMILIO,

Appellants.

Harry H. Levine, Brooklyn, N.Y., for appellant Santanella.

Jacob Evseroff, Brooklyn, N.Y. (Bennett M. Epstein of counsel for appellant Cappiello).

Albert J. Brackley, Brooklyn, N.Y., for appellant Tamilio.

Eugene Gold, District Attorney, Brooklyn, N.Y. (Michael Gore of counsel), for respondent.

Appeals by defendants from three judgments of the Supreme Court, Kings County (RINALDI, J.), one as to each of them, all rendered June 24, 1977, convicting each of them of two counts of murder in the second degree, upon a jury verdict, and imposing sentence.

Judgment as to defendant Tamilio affirmed.

Judgments as to defendants Santanella and Cappiello reversed, on the law, and new trial ordered as to them.

Defendants were each charged, *inter alia*, with two counts of murder in the second degree. The indictment alleged that on or about August 10, 1976 defendants, "having attempted to commit and committed the crimes of robbery and burglary, and in the course of and in furtherance of such crime[s] and of immediate flight therefrom," caused the deaths of Joseph and Angelina Tucci by means of a blunt instrument.

Each of the defendants employed a distinct strategy on his defense. Defendant Santanella did not testify in his own behalf. Upon summation Santanella's counsel conceded that his client had driven defendants Cappiello and Tamilio to the Tucci home on the morning of August 10, 1976. Santanella was, in fact, identified by a neighbor of the Tuccis as one of those who was seen emerging from the alleyway of the Tucci home on the morning in question. Tamilio was also so identified. However, Santanella's counsel sought to portray his client as a "patsy" in this case. He contended that Santanella had no idea where he was taking Cappiello and Tamilio, that once at the Tucci home he took no part in the crime and that he had received no part of the proceeds therefrom. To the contrary, an acquaintance of Santanella testified at the trial that Santanella had admitted to him that he had participated in a robbery in which two people had been killed. However, Santanella disclaimed responsibility for the actual murders.

Defendant Cappiello made several statements to the police, the Assistant District Attorney and friends, which were admitted into evidence at the trial. Those statements clearly implicated Cappiello in the alleged robbery and burglary. Cappiello did not testify in his own behalf. Upon summation, his counsel conceded that Cappiello was guilty of the underlying felony. He, too, denied that his client had any knowledge that a murder would be committed and denied that his client had in any way participated in the murders.

Defendant Tamilio, who had also been identified as one of those who emerged from the alleyway of the Tucci home on the morning of August 10, 1976, knew Joseph Tucci. Tamilo's father and Mr. Tucci were business associates. Tamilio, testifying in his own behalf at the trial, conceded that he, Santanella and Cappiello had gone to the Tucci home on the morning of August 10. However, he stated that he was doing an errand for his father and denied that the crime was committed at that time. It was his contention that the Tuccis were alive at the time he was seen emerging from the alleyway and he presented several witnesses in an attempt to establish that claim. Upon summation, Tamilio's counsel argued that some time subsequent to the time his client left the Tucci home that morning, someone entered and committed the crimes for which defendants were indicted.

At the conclusion of the summations, the court charged the jury. As a part thereof, the court charged the affirmative defense to felony murder. The crime of felony murder is defined by subdivision 3 of section 125.25 of the Penal Law. After the definition the affirmative defense is set forth as follows:

"except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

"(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

"(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

"(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

"(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury."

The court's charge on this issue, was, in pertinent part, as follows:

"We have another portion of our law that is peculiar to felony murder cases, and I have had your attention and I would like to keep it. So, please listen. This is called an affirmative defense. We call it affirmative defense of non-killer. The law is as follows: On proof of certain mitigating circumstances the law allows a jury to find a defendant not guilty of felony murder who, although a participant in the underlying felony was not himself the person who caused the death of the decedent. I emphasize, however, that you are not to consider this defense unless the evidence satisfies you beyond a reasonable doubt that such defendant has been proven guilty of felony murder. It is only available to a non-killer defendant, and only after you, the jury, are satisfied of the guilt of such defendant beyond a reasonable doubt as to the felony murder.

Only then may the jury turn to a consideration of the mitigating factors of his defense, that he was a non-killer.

* * *

"Before you may find a non-killer defendant not guilty of felony murder by reason of the foregoing affirmative defense, you must be satisfied that all of these mitigating factors have been proved when all of these mitigating factors have been proved to exist the law then allows the jury to extend mercy to such non-killer by finding him not guilty of the felony murder, but guilty instead of the robbery or the burglary in which he participated.

* * *

"If from the evidence adduced at this trial you are satisfied beyond a reasonable doubt that a defendant has been proven guilty of felony murder, it is only then that you may turn to a consideration of the mitigating factors of his defense that he was not the killer. If you decide to consider this, you must be satisfied that all of the mitigating factors have been proved to exist under the instructions I have given to you. If you are satisfied that all the mitigating factors have been proved to exist as to a non-killer defendant, you may, if you so decide, extend mercy to such non-killer defendant by finding him not guilty of felony murder, but guilty instead of [the] robbery or burglary in which he participated, in the degree that has been proven beyond a reasonable doubt."

All of the defendants now claim that that portion of the charge is reversible error. There can be no question that that portion of the charge was improper. By it, the court gave the jury the option of (1) not considering the affirmative defense, even if it were satisfied that one or more of the defendants was otherwise guilty of felony murder or (2) finding one or more of the defendants guilty of felony murder, not-

withstanding the fact that all of the elements of the defense had been made out, because it felt that the extension of mercy was inappropriate under the circumstances of the case. There is no authority for the proposition that a jury may be given untrammeled discretion as to the application of an affirmative defense. If the jury had found any or all of the defendants guilty of felony murder beyond a reasonable doubt, it was bound to consider whether such defendant or defendants had established the elements of the affirmative defense by a fair preponderance of the evidence. If the jury had then found those elements to have been properly established, it would then have been bound to enter a verdict of not guilty of felony murder. While the affirmative defense is a clemency statute in the sense that it requires the jury to consider, in its deliberations, certain circumstances in mitigation of the acts alleged, such "mercy" arises automatically upon satisfaction of the statutory requirements. There is no option.

We hold that that portion of the charge was clearly prejudicial as to defendants Santanella and Cappiello. The evidence presented at the trial would clearly have permitted the jury to find that one or both of those defendants had participated in the underlying robbery and burglary and, consequently, without more, were guilty of felony murder. At the same time, however, the jury could also have properly found that the evidence showed that one or both of them had satisfied all of the elements required to acquit them of felony murder by reason of the affirmative defense. It is of no moment that neither defendant testified in his own behalf at the trial. The jury could have found the defense to have been established by the prosecution's own evidence, particularly by the statements made by each of those defendants.

It is not apparent from the general verdict whether the jury refused to give any consideration to the defense, or considered the defense but found the elements not to have been established by a fair preponderance of the evidence, or considered the defense and found the elements to have been properly established, but refused to find in favor of Santanella and/or Cappiello because it felt them to be unworthy of mercy. All these were possibilities under the court's charge. Accordingly, the said defendants are entitled to a new trial.

The situation is different as to defendant Tamilio. As indicated, his defense was that he was not present at the time the crimes were committed. The prosecution's evidence, if believed, would tend to establish that Tamilio was in fact present at the time the robbery and burglary had been committed, that he participated in those crimes and, consequently, that he was guilty of felony murder. Conversely, there is no evidence in the record tending to support a theory that Tamilio was a nonparticipating bystander to the murders. Under these circumstances, the jury, as to Tamilio, could not properly have returned a verdict of not guilty of felony murder based upon the establishment of the affirmative defense. Thus, the court's improper charge was not prejudicial as to him and he is not entitled to a new trial on that basis.

We have considered defendant Santanella's claim that the court erroneously denied his motion to suppress certain identification evidence and defendant Cappiello's argument that the court erroneously denied his motion to suppress certain statements made by him to the police and the Assistant District Attorney. We find both of those arguments to be

without merit. Accordingly, upon the remand, the court need not conduct a new *Wade* or *Huntley* hearing.

Upon this disposition of the appeals of defendants Santanella and Cappiello, we need not reach the remaining arguments raised by them, and we do not do so.

We do find it necessary, however, to dispose of one further argument raised by defendant Tamilio. At the trial, Tamilio made several motions for a severance based upon *Bruton v. United States* (391 US 123), contending that the statements of his codefendants which were introduced at the trial, particularly those of Cappiello, inculpated him in the crimes charged and, accordingly, heightened the risk that the jury would use them to find him guilty. The court denied each of the motions. Tamilio now cites the failure to grant him a separate trial as reversible error. We find no merit to that contention.

In *People v. McNeil* (24 NY2d 550), the Court of Appeals adopted the holding of other State and Federal cases to the effect that the *Bruton* rule was inapplicable where each of the defendants has made a confession almost identical to the confessions of his codefendants. The critical consideration is whether the confession of the defendant relying upon *Bruton* "interlocks with and supports" the confessions of the other defendants (*People v McNeil*, 24 NY2d at p. 553). If it does, a separate trial is not required.

In this case, defendants Santanella and Cappiello each made a statement or statements implicating themselves and Tamilio in the robbery and burglary.

Tamilio himself made a statement in which, at the least, he admitted participation in the underlying crimes. Thus, to that extent, Tamilio's statement interlocks with and supports those of his codefendants.

Certain of the statements of Santanella and Cappiello also either implied or asserted that it was Tamilio who actually committed the murders of the Tuccis. Tamilio's own statement does not clearly implicate himself as the actual murderer. Thus, to that extent, Tamilio's statement does not interlock with and support those of his codefendants. However, under the circumstances of this case, such failure is not prejudicial and does not prevent application of the *McNeil* rule.

Since the indictment charged Tamilio with felony murder, his conviction on those counts flowed automatically from the prosecution's showing that he participated in the underlying felony, during the course of which one of the defendants caused the deaths of the Tuccis. It was unnecessary for the prosecution to prove that Tamilio actually committed the murders. Accordingly, so much of the statements of Santanella and Cappiello as characterized Tamilio as the actual murderer was extraneous to the question of Tamilio's guilt or innocence of felony murder. Therefore, those portions of the codefendants' statements could not have been prejudicial to Tamilio, and it was unnecessary that such portions of those statements interlock with and be supported by a statement by him.

We note that the discrepancy between Tamilio's statement and those of his codefendants regarding Tamilio's role as the murderer might have been rele-

vant to the establishment of the affirmative defense to felony murder, since a defendant is required to establish, as part of that defense, that he did not commit the homicidal acts. However, as noted, Tamilio did not rely upon, and the evidence as against him did not suggest the availability of, the affirmative defense.

Accordingly, since Tamilio's own statement interlocked with and supported those of his codefendants on the issue of his participation in the underlying felony, the standard enunciated in *People v. McNeil (supra)* was satisfied and there was no error in the court's refusal to grant Tamilio a separate trial.

SHAPIRO, J.P., COHALAN, MARGETT and O'CONNOR, JJ., concur.